IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH

JUDGMENT

Smt. Renuka Vs. Rajendra Hada
(D.B. Civil Misc. Appeal No.967/1994)

D. B. Civil Misc. Appeal under Sec.19 of the Family Court Act,1984 against the judgment and decree dated 17-9-1994 in Case No.234/1992 passed by Sh. Ashok Kumar Sharma, RHJS, Judge, Family Court Ajmer.

Date of Judgment: January 18, 2007.

PRESENT

HON'BLE MR. JUSTICE SHIV KUMAR SHARMA
HON'BLE MR. JUSTICE R.S.CHAUHAN

Mr. Saransh Saini, for the appellant.

Mr. Ravi Chirania, for the respondent.

BY THE COURT:(PER HON'BLE Shiv Kumar Sharma,J.)

In this appeal, the wife is the appellant. She has assailed the decree of nullity dated September 17, 1994 of the learned Judge Family Court Ajmer whereby the petition filed by the respondent husband under section 12 of the Hindu Marriage Act,1955 (for short `Act') was allowed and marriage between the two was annulled on the ground that it had not been consummated owing to the impotence of the wife.

2. The respondent husband in the petition sought relief to declare the marriage of respondent with the appellant, a nullity. It was averred in the petition that the marriage of the two had taken place on March 6, 1992 as per Hindu rites at Ajmer. After the marriage there was no marital and physical relationship between the two. Inspite of efforts of respondent the appellant did not cooperate right from the first night of the marriage. Due to

this indifferent attitude of the appellant, the respondent was living a life of tension which had affected his family and social status. On the first night of marriage the appellant told respondent that she did not want to enter into marriage. She was grown in such an atmosphere that the institution of marriage was fake for her and she did not prepare herself to live with the respondent mentally. In such circumstances she was not in a position to establish any type of relations with the respondent and they could live as friends. She also told respondent that she was dedicated physically and mentally to Kumari Aruna Sharma, who was her Guru, God, Teacher and everything. The respondent thus on the ground of impotency of appellant prayed to declare the marriage as null and void.

3. The appellant filed reply and denied the allegations made by the respondent. She stated that the respondent himself did not behave properly with her and on March 6, 1992 the respondent ousted her of the room saying that the marriage was held in compulsion and he had love affairs with some other girl. It was denied that the appellant had even refused to establish bodily relations with the respondent. The averments made in regard to Aruna Sharma were also denied. In the additional pleas the appellant stated that no cause of action for filing the application did ever arise. The respondent being an Advocate concocted false story just to get rid of the appellant right from the first day of the marriage.

4. On the basis of pleadings of the parties learned trial Court framed as many as five issues. The appellant and respondent respectively examined five and three witnesses. Thereafter on hearing final submissions learned Family Court allowed the petition as indicated above.

5. Learned counsel for the appellant criticised the impugned judgment and raised following points:-

(i) No ground under section 12 of the Act has been made out. Though the respondent has not specifically taken out a ground under section 12(a) of the Act the learned Family Court has granted a decree. Section 12(a) provides that the marriage could be annulled by a decree of nullity on the ground that the marriage has not been consummated owing to the impotence of the respondent. In the instant case the husband took a ground in the pleadings that there was no intercourse between the parties and also as alleged that as per information of the respondent she was impotent. The later ingredient of impotency is an ingredient which ought to have been proved for bringing a case for decree of nullity. The respondent has totally failed to prove this aspect of the matter. He had only relied on the information said to have been given by the appellant herself. The respondent husband was not having any knowledge of this fact nor he claimed either in the petition or in his statement. The alleged admission/ information of the appellant that she was impotent is not enough for giving a decree of nullity particularly when she has denied this fact in reply to the petition as well as in her statement.

(ii) Respondent filed the petition on the basis of an imaginary story and he has tried to bring his case under the provisions of Section 12(a) of the Act. It is also proved on the ground that the respondent did not claim in the divorce petition nor in his

statement that he ever discussed the fact of impotence or non consummation of marriage or disclosed the same to any of his brothers, parents, relations, friends or relations of the appellant after March 6, 1992 till he filed the petition for divorce. The story as brought out by respondent in the divorce petition is altogether imaginary and is not sustainable.

(iii) Respondent gave a notice (Ex.6) dated September 21, 1992 to the appellant running into eleven pages in which he did not take the plea of impotency, rather he called upon the appellant to live with him and establish conjugal harmonious relations. Had it been a case of impotency, he would not have given such a notice. The very contents of the notice go to show that there was no case of impotency.

(iv) The ground of impotency is in the nature of defamation. It is a black spot in the society on one individual's personality. It ought not to have been decided in a very casual manner. The refusal of the appellant for a medical check up could not be taken to be a ground for adverse inference because it was her right to refuse the same.

(v) The family court has committed a mistake when it did not consider that the respondent did not produce any witness to whom he had ever said that the marriage was not consummated owing to the impotence of the appellant, nor he gave any name or produced any witness to show that the marriage was solemnized without the consent of the appellant. In the instant case even if the case of respondent is taken to be

proved, namely that till the time of solemnization of marriage the respondent husband was not having any grievance and it grew only after when both of them went to their bedroom on the night of March 6, 1992 immediately after the marriage had taken place, it will not prove anything that something transpired between the husband and the wife, which was known to them only, resulted into serious feuds between the parties. The learned Family Court committed a mistake apparent on the face of the record when it did not believe the true version of the appellant namely, that after marriage the respondent informed appellant that he was in love with some other girl and that the appellant could not take her place and turned the appellant out of the bedroom.

(vi) The appellant is a potent person. The allegation of respondent husband is without any basis. It is based only on hearsay. He did not say that at the time of consummation of the marriage he ever felt that the appellant was suffering from any physical or mental handicap.

(vii) The details regarding impotence ought to have been given in the petition. In the petition it has been mentioned that the appellant informed him that she was impotent and no details had been given which is being tried and established to be produced by the respondent at the time of statements. Details of trying for consummation of marriage and steps taken by the respondent as given in the statement were not given in the petition and as suh they ought not to have been taken into

consideration for the purpose of deciding the petition under Section 12(a) of the Hindu Marriage Act. Besides, the admission made by the husband of his alleged failure to consummate the marriage could not be said to be proof of impotence.

(viii) It is proved on record that the marriage of the younger brother of the husband was celebrated on the night of March 10/11, 1992 and that both husband and wife remained in the bedroom for long periods till the appellant came down stairs weeping on March 6, 1992 and narrated the story to her sister Deepika, that as to what her husband has said and as to what treatment he had given to her. This was the first version. Deepika, who was of tender age came in the witness box, she understood the value of oath and on oath she had given out the true facts as to what happened on the night of March 6, 1992. The learned Family Court has committed a mistake in not taking into consideration the established first version of the behaviour of the respondent on that night with the appellant and committed mistake in believing the story of the respondent that the appellant informed the respondent about her impotence. The story of Aruna Sharma as brought by the respondent was also concocted. She was neither produced in the witness box nor that allegation of lesbianism has been proved by the respondent in any manner whatsoever.

(ix) The respondent has admitted in his cross examination that both of them were sharing only one bedroom. The learned Family Court has committed a mistake when it did not take into

consideration the letter dated July 30, 1992 in which father of appellant clearly mentioned that it was difficult for him to fulfill the desire of respondent and he could come and talk to him.

(x) In the petition the respondent has nowhere stated that the consummation of the marriage could not take place owing to the impotence of the appellant. In paras 4 and 5 it has been alleged by the respondent that on inquiry on the night between March 6&7, 1992 the appellant gave out that she had entered into the marriage under compulsion on account of the directions given by her father and her guru; that she was devoted to her guru and she was her property (amanat) and that she was not in a position to create any relationship with the respondent. In para 8 it has been alleged that Aruna Sharma was whole and sole of the appellant and her soul and heart and body devoted to Aruna Sharma. It was further given out by the respondent that she was having sexual relationship with Aruna Sharma and she had given a threat that in case the appellant had sexual relationship with anybody else then this fact would be disclosed by her. This allegation on the face of it was unbelievable. In para 9 it has further been alleged that as per the appellant an information was given by Aruna Sharma to her that she (the appellant) could live only with a lady and not with a male and in case she ever creates any relationship with any male then she would repent for it. Explanation was also allegedly sought by the respondent as to why Aruna Sharma

allowed the appellant to enter into marriage with the respondent on this it was alleged that the appellant further informed the respondent that as per Aruna Sharma husband of appellant was a lawyer, journalist and learned man and he would understand the things and would not insist on sexual intercourse and reconcile with the situation. No case under section 12(a) of the Act from the aforesaid paragraphs has been made out. The respondent has nowhere stated that the consummation could not take place because of impotence of the appellant. What was mentioned in the divorce petition was altogether a different matter. Even if they are taken to be correct, though the same is emphatically denied, no case under section 12(a) of the Act could be said to have been made out and no decree on those pleadings could be passed.

(xi) In para 31 of the petition it has been alleged that no consummation of the marriage had taken place between the parties because the appellant would not consider herself to be competent for this purpose, because the respondent did not consider the appellant to be a physically and mentally competent person. On a bare reading of this para it would become clear that it was not the case of the respondent that appellant was not physically and mentally competent to enter into sexual relationship of marriage whereas as per the averments made in this regard it was the respondent who was not physically and mentally competent person to enter into such a relationship.

6. Per contra, learned counsel for the respondent supported the impugned judgment and urged that the respondent specifically pleaded in the petition that he did not have physical relations with the appellant and on May 19, 1993 he moved an application under section 151 Code of Civil Procedure for medical examination of the appellant, but she refused to submit herself for medical examination, therefore adverse inference was drawn against her and issue No.1 that the respondent could not consummate his marriage on account of mental and physical impotence of appellant, was rightly decided.

7. We have pondered over the rival submissions advanced before us.

8. Having scanned the material on record we notice that the respondent examined himself as Aw.1. In his deposition he stated that on the night of marriage when he made attempt to undress the appellant she pushed him away and told him that her marriage was held under compulsion and she was not a consented party. He again made attempt to have sex with her but he was again pushed by the appellant and she went out of the room and gathered all relatives present in the house. In their presence she told that she was not ready for the marriage, therefore she should not be compelled to live with the husband. On the second night also when the respondent tried to undress the appellant but she pushed him and told him that she performed the marriage at the instance of her guru Aruna Sharma with whom the appellant was having illicit relations, therefore she was unable to have sexual relations with any other male person. She had suffered some disease and became impotent. He further stated about the third night i.e. 8th March, that when he made attempt to have intercourse the appellant again prevented

him. She also told him that Aruna Sharma had threatened her that if the appellant would try to have sexual relations with other person she (Aruna Sharma) would commit suicide and implicate her in the case. He also deposed that the appellant sent a notice (Ex.1) in the first week of July,1992 in the envelop (Ex.2) from Sirohi, wherein she levelled allegations against the respondent for not fulfilling the marital obligations. Thereafter the respondent immediately sent the notice Ex.6 requesting the appellant to live with him.

9. The appellant (Naw.1) in her deposition stated that in the first night after the marriage the respondent himself ousted her of the bedroom. On pursuation of his father and brother however the respondent established sexual relations in the night. She denied to have any relations with Aruna Sharma. She also denied to have any disease on her private parts. She however admitted that when she was ousted from the bedroom by the husband, she went to her sister Deepika and they had slept in the room of mother of her husband.

10. It appears from record that the respondent moved application on May 19, 1993 under section 151 of the Code of Civil Procedure requesting the Family Court to direct the appellant to submit herself for medical examination but she expressed her unwillingness for the same.

11. During pendency of appeal however the appellant filed an application for the first time before High Court that she was prepared to go through the medical examination which she had refused earlier. This court vide order dated October 18, 2006 granted opportunity to the appellant to produce a medical certificate from the head of the Gynecology Department, SMS Hospital Jaipur to the effect that she was medically fit and was never

impotent even in the past. Pursuant to the order the Medical Board was constituted and the appellant was examined on November 7, 2006. On the basis of Gynecology examination of the appellant, the Medical Board indicated as under:-

> "Secondary sexual characters are well developed. External genitalia well developed hymen torn old irregular, vagina admitted two fingers easily, cervix felt normal, uterus antiverted, antiflexed normal size firm mobile fornices free.
>
> The members of the Medical Board are of the opinion that appellant is fit for sexual intercourse, her hymen is torn and vagina admits two fingers indicating sexual intercourse in past."

12. The questions for consideration in the instant appeal are:-

(i) Whether a matrimonial court had power to order appellant to undergo medical test?

(ii) If despite the order of the court, the appellant refused to submit herself to medical examination whether the court could draw adverse inference against her?

(iii) Whether the respondent has succeeded in satisfactorily establishing that the appellant was impotent at the time of marriage and at the time of filing of the petition?

13. We find answer of these questions in two decisions rendered by the Hon'ble Supreme Court in Sharda Vs. Dharmpal (2003)4 SCC 493, wherein it was indicated that if despite an order passed by the court a person refuses to submit himself to such medical examination, a strong case for drawing an adverse inference would be made out. Section 114 of the Evidence Act also enables a court to draw an adverse inference if the party

does not produce the relevant evidence in his power and possession. The conclusion drawn by the Apex Court are as under:-

> (i) A matrimonial court has the power to order a person to undergo medical test.
> (ii) Passing of such an order by the court would not be in violation of the right to personal liberty under Article 21 of the Constitution.
> (iii) However, the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an inference against him.
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> (Emphasis supplied)

14. In Yuvraj Digvijay Singh v. Yuvraj Pratap Kumari (AIR 1970 SC 137) considered a case under section 12(1)(a) of Hindu Marriage Act,1955 and propounded as under:- (Para 5)

> "A party is impotent if his or her mental or physical condition makes consummation of the marriage a practical impossibility. The condition must be one according to the statute, which existed at the time of the marriage and continued to be so until the institution of the proceedings. In order to entitle the appellant to obtain a decree of nullity, as prayed for by him, he will have to establish that his wife, the respondent, was impotent at the time of marriage and continued to be so until the institution of the proceedings."

(Emphasis supplied)

15. It is no doubt true that a refusal to consummate a marriage would not necessarily lead to a conclusion that the appellant was impotent at the time of the marriage or that she had continued to be so at the time of the filing of the petition for declaring the marriage as null and void. But in the present case, from the evidence of respondent together with the attendant facts and circumstances and the conduct of the appellant herself it could be fairly inferred that the appellant was impotent as alleged by the respondent. The evidence of the husband, which we have no reason to disbelieve discloses that the appellant wife had persistently exhibited an invincible repugnance to consummate the marriage. The appellant was unwilling to get herself medically examined. Upon an application made by respondent learned Family Court ordered the appellant to get herself examined by the Medical Expert, as stated already, she expressed her unwillingness to get herself examined by a medical expert.

16. TOLSTOY in his book “A Law and Practice of Divorce” 6th Edition at page 113 states that the inphysical defect which is incurable or to one which is curable but which the respondent refuses to have cured. At page 114 TOLSTOY says that the marriage has not been consummated and that such non-consummation was due to respondent's incapacity lies on the petitioner. In the absence of evidence of impotence a spouse will be presumed to be normal. The rules provided for a medical inspection of the parties in the case of nullity for impotence or willful refusal to consummate, but the court may grant a decree though the respondent refuses to submit to the inspection. In fact respondent's refusal may incline the court to draw the inference that the petitioner's allegations are true.

17. Evidently in the instant case since the appellant expressed her unwillingness to get examined by the medical expert, learned Family Court was entitled to draw the adverse inference against her. Learned Family Court in our opinion did not commit any illegality in declaring the marriage of appellant and respondent as null and void under section 12(1)(a) of the Act. Subsequent opinion of the Medical Board after about 14 years that the appellant did not have any structural defect does not affect the decree passed by learned Family Court since the respondent husband had to establish that at the time of marriage the appellant was impotent and continued to be so until the institution of the petition. The basis of interference of the Family Court was not the structural defect but the impracticability for a consummation.

18. Lord Penzance in the case of G. Vs. G. 1871-2 P&D and 287 = 40 LJ Mat 83 considered a case where the marriage could not be consummated owing to the hysteria or extreme sensibility of the wife and there was no question of any structural defect. The learned Judge laid down that:-

> "but the basis of the interference of the Court is not the structural defect but the impracticability for a consummation. If, therefore, a case presents itself involving the impracticability (although it may not arise from a structural defect) the reason for the inference of the Court arises. The impossibility must be practical. It cannot be necessary to show that the woman is so formed that connection is physically impossible if it be shown that connection is practically

impossible or even if it be shown that it is only practicable after a remedy had been applied which the husband cannot enforce, and which the wife, whether willfully or acting under the influence of hysteria, is determined not to submit to."

19. For these reasons, we find no merit in the instant appeal and it stands accordingly dismissed. No costs.

(R.S.Chauhan),J. (Shiv Kumar Sharma)J.

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